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CLERK

86-1065

No.

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1986

UNITED STATES OF AMERICA

Respondent,

v.

THE CITY OF CHICAGO

Respondent,

v.

PETE O'SULLIVAN, TERRENCE WHIRTY, JACK CLARK, MIKE DELANEY, JOSEPH LAMONICA, JOSEPH O'NEAL, DANIEL CAULFIELD, KEVIN O'MALLEY, JAMES FITZGIBBON, DON SHELDREW, MICHAEL COLLINS, SCOTT LYNCH, THOMAS RUANE, LAWRENCE MAHLER, DANIEL O'FARRELL Jr. individually and as class representatives,

Petitioners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE EQUAL PROTECTION CLAUSE PROHIBIT A PUBLIC EMPLOYER FROM ENTERING INTO A CONSENT DECREE WHICH REQUIRES THAT LESS QUALIFIED MINORITIES BE HIRED IN PREFERENCE TO MORE QUALIFIED WHITES WHERE THERE WAS NO COMPELLING STATE INTEREST TO DO SO NOR ANY FINDINGS OF PRIOR RACIAL DISCRIMINATION ?

II. CAN THE "TIMELINESS" REQUIREMENT FOR INTERVENTION BE UTILIZED TO PROTECT A PATENTLY UNCONSTITUTIONAL CONSENT DECREE FROM ATTACK BY THIRD PARTIES ?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW...i

TABLE OF AUTHORITIES.....iv

OPINIONS BELOW.....2

JURISDICTION.....3

CONSTITUTIONAL and STATUTORY PROVISIONS.....3

STATEMENT OF THE CASE.....5

REASONS FOR GRANTING THE WRIT

I. DOES THE EQUAL PROTECTION CLAUSE PROHIBIT A PUBLIC EMPLOYER FROM ENTERING INTO A CONSENT DECREE WHICH REQUIRES THAT LESS QUALIFIED MINORITIES BE HIRED IN PREFERENCE TO MORE QUALIFIED WHITES WHERE THERE WAS NO COMPELLING STATE INTEREST TO DO SO NOR ANY FINDINGS OF PRIOR RACIAL DISCRIMINATION.....12

II. CAN THE "TIMELINESS" REQUIREMENT FOR INTERVENTION BE UTILIZED TO PROTECT A PATENTLY UNCONSTITUTIONAL CONSENT DECREE FROM ATTACK BY THIRD PARTIES....18

CONCLUSION.....27

CERTIFICATE OF SERVICE.....28

APPENDICES

A. OPINION OF THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THE CASE OF UNITED STATES V CITY OF CHICAGO 1A

B. MEMORANDUM OPINION AND ORDER OF JUDGE FRANK McGARR IN UNITED STATES V CITY OF CHICAGO. 1B

C. SECTION 16.10 AND "APPENDIX I" TO THE UNION AGREEMENT.....1C

D. EXCERPTS FROM THE 1974 CONSENT DECREE.....1D

E EXCERPTS FROM THE 1979 CONSENT DECREE.....1E

TABLE OF AUTHORITIES

CASES:

Britton v.South Bend School Dist,
775 F.2d 794 (1985) 17

Hodgson v. United Mine Workers,
473 F.2d 118 (D.C. Cir. 1972).....23

Janowiak v. City of South Bend,
750 F.2d 557 (7th Cir. 1984) 17

Local 28 Sheet & Metal Worker's
International Assoc v.EEOC,
478 U.S.___, 92 L.Ed.2d.444, 106 S.Ct.___
(1986) 14

Local 93, International Assn of
Firefighters v. City of Cleveland,
478 U.S.___, 92 L.Ed.2d.405, 106 S.Ct.__
(1986) 14, 20, 21, 22

NAACP v. New York
413 U.S. 345, 93 S.Ct 2591 (1973).....24

Stallworth v. Monsanto Company,
558 F.2d 257 (5th Cir. 1977).....18.

United Airlines, Inc v.McDonald,
432 U.S. 385, 97 S.Ct.2464 (1977).....23

Wygant v. Jackson Board of Education,
476 U.S.___, 90 L.Ed.2d.260, 106 S.Ct.__
(1986)..... 13, 14, 15, 16

U.S. CONSTITUTION

United States Constitution,
Amendment XIV.....9, 15

STATUTES

Title 42 U.S.C. Section 1981.....9

Title 42 U.S.C. Section 1983 9

F.R.C.P. 24 (INTERVENTION) 18

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Pete O'Sullivan, Terrence Whirty, Jack Clark, Mike Delaney, Joseph Lamonica, Joseph O'Neal, Daniel Caulfield, Kevin O'Malley, James Fitzgibbon, Don Sheldrew, Michael Collins, Scott Lynch, Thomas Ruane,

Lawrence Mahler, Daniel O'Farrell Jr., individually and as class representatives, respectfully petition The United States Supreme Court for a writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's judgment of August 14, 1986 in United States of America v. City of Chicago 798 F.2d 969 (7th Cir. 1986).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the case of United States of America v. City of Chicago 798 F.2d 969 (7th Cir. 1986). A copy of the opinion is included herein as Appendix A.

The opinion of the United States District Court for the Northern District of Illinois is not officially reported at this time. The unofficial citation is

United States of America v. City of Chicago No. 73 C 661 (N.D.Ill. June 19, 1985). A copy of the opinion is included herein as Appendix B.

JURISDICTION

The date of the judgment of the Court of Appeals was August 14, 1986. Petition for rehearing was denied on September 26, 1986. This Court has jurisdiction under 28 U.S.C. 1254.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalities, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1974 the City of Chicago and the Justice Department entered into a consent decree (the 1974 decree) which required that one minority person be hired for every white person hired as a Chicago Firefighter. This was done by agreement without any showing or finding that the City had engaged in discrimination. The

apparent purpose of the decree was to increase minority membership in the ranks of of the Fire Department so that "it may become more representative of the racial and ethnic composition of the City as a whole" (See Appendix D). The City at all times denied that it had discriminated against anyone, and the consent decree expressly recited that it should not be construed as an adjudication or finding of discrimination.

In 1978 the City gave a firefighters test and, as a result, formulated a new firefighter eligibility list (the 8106 list). Petitioners are the remaining members of this list. After privately reviewing this list the Justice Department and the City entered into another consent decree (the 1979 decree) which permitted the City to use the new eligibility list in rank order until July 1, 1981 or until the 500th name was

reached on the list. The list was not supposed to be used beyond this point, but if it was, any further hiring from the list was required to be on a one for one racial quota basis.

In February of 1980 the Chicago Firefighters Union called a strike. The City attempted to break the strike by giving the strikers' jobs to persons on the eligibility list. The Petitioners refused to cross the picket lines.

The strike was settled and on March 1, 1982 and a union agreement was reached which was enacted as a City ordinance on March 30, 1982. The agreement made extensive provisions for the future hiring of the remaining members of the 8106 List, many of whom, including Petitioners, had honored the strike, and refused to cross picket lines. In the Union contract the City agreed to continue to hire off the 8106 list

throughout the term of the Union agreement unless a different priority was ordered by the Federal Court. Furthermore, in the event that the list could no longer be used, the City agreed not to object to any remaining members on the list receiving priority status on any subsequent list. (See Appendix C). Accordingly, the petitioners assumed that they would eventually be hired and that the only question remaining was when.

The City continued to hire off the 8106 list on a one for one basis until March of 1985, presumably on the basis of the Union agreement. At that time the City claimed that the eligible minorities on the list had been exhausted. The only minorities remaining on the list were apparently ineligible for employment due to their background or physical exam. The City announced that it was going to

cancel the 8106 list and conduct a new examination. All hiring off the list ceased. The Petitioners are the only remaining eligible members on the list. There are 374 of them and they are all white. The City has objected to all attempts by petitioners to secure any priority status, and has ignored the promises and representations made in the Union agreement.

In immediate response to the City's announcement that the list would be cancelled the Petitioners filed an Application for Leave to Intervene and file a complaint against the City. The Petitioners argued in the District Court that their constitutional rights under the 14th Amendment and under sections 1981 and 1983 of Title 42 had been violated by the City. Jurisdiction was predicated on 28 U.S.C. 1343(3) and 1331. In the District Court Petitioners argued that:

1. They had been discriminated against on the basis of race in that the consent decree entered in 1979 containing one for one hiring provisions without any findings that the City had engaged in prior racial discrimination.

2. That the City terminated the 8106 list solely for a racially discriminatory reason, to wit: the alleged absence of any further qualified minority candidates to match up with white candidates on the 8106 list.

3. That the City had been arbitrary and capricious in its application and compliance with the Decree, and had on occassion hired persons who were not even on the list, and had hired persons without regard to the one for one requirement.

4. That the Union Agreement entered into between the City and the Firefighters Union created property

rights which they have been deprived of without due process of law.

In their complaint the petitoners sought the following relief:

1. Class Status

2. Injunctive relief enjoining the City from striking the list

3. Declaratory judgement that the 1979 Decree was unconstitutional on its face, or was being unconstitutionally applied to petitioners

4. Vacation of the 1979 Decree, money damages, and appropriate equitable relief.

The District Court denied the Application for intervention and the Seventh Circuit Court of Appeals affirmed. It is submitted that a writ of certiorari should issue to the Seventh Circuit and that this Court should review the case.

REASONS FOR GRANTING THE WRIT

I. DOES THE EQUAL PROTECTION CLAUSE A PUBLIC EMPLOYER FROM ENTERING INTO A CONSENT DECREE WHICH REQUIRES THAT LESS QUALIFIED MINORITIES BE HIRED IN PREFERENCE TO MORE QUALIFIED WHITES WHERE THERE WAS NO COMPELLING STATE INTEREST TO DO SO NOR ANY FINDINGS OF PRIOR RACIAL DISCRIMINATION. ?

This case involves the important public issue of what showing a public employer must make in order to justify the adoption of an affirmative action hiring policy.

In the present case the City of Chicago, entered into a consent decree in 1974 requiring race-based hiring. This decree was superceded by another decree in 1979 which also contained provisions

requiring one for one hiring under certain circumstances. At no time prior or subsequent to the entry of these decrees did the City ever demonstrate or produce any evidence that it had engaged in prior racial discrimination with respect to its hiring practices. In fact, the City at all times prior to the entry of the decree denied that it had engaged in discrimination, and the decree expressly provided that it should not be construed as an admission of discrimination. The only interest identified by the City to justify its preferential hiring was to make the fire department membership more representative of the racial and ethnic make up of the City as a whole.(See Appendices D & E).

The decisions of the District Court, and the Court of Appeals are contrary to this Court's recent holdings In Wygant v. Jackson Board of Education, 476

U.S.___, 90 L.Ed.2d 260, 106 S.Ct.___ (1986). Local 28 of the Sheet & Metal Worker's International Assoc v.EEOC, 478 U.S.___, 92 L.Ed.2d.444, 106 S.Ct.___ (1986) and Local 93, International Association of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S.___, 92 L.Ed.2d.405, 106 S.Ct.___ (1986).

In Wygant v. Jackson Board of Education, supra, at p. 268 the Opinion of the Court clearly reiterated the propositions that "Racial and ethnic distinctions of any sort are most suspect and therefore call for the most exacting judicial examination" and that this high level of scrutiny applies without regard to whether the persons discriminated against are black or white. Justice Powell delivering the Court's Opinion declared that any hiring preference based on racial criteria must withstand a two pronged test to meet the requirements of

the Equal Protection guarantees of the Fourteenth Amendment:

1. Any racial classsification must be justified by a compelling State interest; and

2. The means choosen by the State to effectuate its purpose must be narrowly tailored to the achievement of that goal. Wygant v. Jackson Board of Education, supra, at 268.

In the present case the consent decrees imposing the racial preferences contained no statement of a compelling governmental interest which would require the imposition of the hiring preferences. The sole purpose of the decree was to insure that the racial composition of the Fire Department would "become more representative of the racial and ethnic composition of the City as a whole." The City steadfastly denied that it had engaged in any discriminatory practices

and accordingly by its own statements had no justification for voluntarily entering into the consent decree.

The decree cannot be justified on societal descrimination alone. As stated in Wygant, at 269

> "This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."

There have been no findings in this case by any court or other competent body that the City, prior to the entry of the consent decree, was guilty of any prior discrimination. In entering into the consent decree in question the City was not attempting to take remedial action for its own prior discrimination but was attempting to create a racial balance by the imposition of preferential hiring.

The Appellate Court's Opinion is also contrary to its own holdings in Janowiack v. City of South Bend, 750 F2d 557 (7th Cir. 1984) and Britton v. South Bend Community School District, 775 F.2d 794 (1985). In those cases the 7th Circuit Court of Appeals held that a race conscious affirmative action program must be based upon "findings of past discrimination by a competent body" and that " an employer must offer something more than a finding of statistical disparity between the percentage of minorities employed and a percentage of minorities within a community to justify the adoption of an affirmative action program.

Accordingly this Court should review the decisions of the District and Appellate Courts and grant this petition for a writ of certiorari.

II. SHOULD THE "TIMELINESS" REQUIREMENT FOR INTERVENTION BE UTILIZED IN THIS CASE TO PROTECT A PATENTLY UNCONSTITUTIONAL CONSENT DECREE FROM ATTACK BY THIRD PARTIES ?

Both the District Court and the Court of Appeals were reluctant to grant the petitioners the right to intervene in the proceedings. Neither Court attempted to directly address Constitutional issues raised by the petitioners but chose instead to find, without any evidentiary hearing, that the petitioners were untimely in asserting their rights to intervene in the litigation, and that they had no protectable interest which would justify granting intervention. Both Courts relied in part on FRCP 24 as interpreted in Stallworth v. Monsanto Company, 558 F.2d 257 (5th Cir. 1977).

This Court shoud grant a writ of certiorari to clarify exactly when and how an affirmative action consent decree may be atacked by third parties. It would seem that an unconstitutional decree should be subject to attack anytime it infringes an individuals rights, and that the Courts should always be open to redress constitutional wrongs. Yet, the District Court and Appellate Court utilized the timeliness requirement to fend off an attack on a patently unconstitutional decree.

It is submitted that the District Court abused its discretion by denying intervention on timeliness grounds and that the Appellate Court erred in affirming that decision.

It is clear from the record that the City had no compelling state interest to justify the racial preferences that were

extended to minorities. It is equally clear that there was no finding by any competent body that the City had engaged in any prior discrimination. Furthermore, the City made no pretense that the racial preferences contained in the consent decree were designed to remedy prior discrimination on the part of the City. The City expressly denied that it had engaged in any prior discrimination and therefore such discrimination could not form the basis for the City's voluntary conduct. Despite the clear illegality of the consent decree and the clear violations of petitioners' constitutional rights both the District Court and the Appellate Court denied the petitioners the right to intervene. In Local No. 93 International Association of Firefighters v. City of Cleveland, supra, at 28 this Court stated that:

> "...Parties who choose to resolve litigation through settlement may not dispose the claims of the third party, and a fortiori, may not impose duties or obligations on a third party, without the parties agreement. The Court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised these claims remain and may be litigated by the intervenor."

The consent decree in this case was analogous to a statute or ordinance. It was the operative law, on a continuing basis, regarding hiring. As such, it should be open to constitutional challenge at any time that it comes in conflict with the rights of individuals.

It is no more logical to say that an unconstitutional consent decree can only be attacked at its inception than it is to say that an unconstitutional statute can only be attacked at the time it is enacted. In Local No. 93, International Association of Firefighters v. City of Cleveland, 478 U.S. ,92 L

Ed.2d 405, 106 S.Ct. (1986) the opinion of the Court clearly defined the nature of a consent decree as having attributes both of contracts and of judicial decrees and pointed out that the dual character of the consent decree has resulted in its receiving different treatment for different purposes. Local No. 93, International Association of Firefighters v. Cleveland, supra, at 421. If the agreement between the City and the government in the present case had been reduced to a private contract instead of a consent decree the petitioners would clearly have standing to attack the racial preferences and timeliness would not be a bar. Because the parties in this case have registered their contract with the Court as a "consent decree" they now employ the services of the Court to protect it from constitutional attack by those whose rights are affected.

Accordingly, the Court is cast in the role of protecting an unconstitutional decree instead of protecting fundamental constitutional rights.

Moreover, the District and Appellate Courts abused their discretion in finding that the attempted intervention was untimely. Timeliness presents no automatic barrier to intervention in post judgments proceedings where substantial problems in formulating relief remain to be resolved. Hodgson v. United Mine Workers, 473 F.2d 118 (D.C. Cir. 1972). The critical inquiry in determining whether to permit post judgment intervention is whether or not in view of all the circumstances the intervenors acted promptly to protect their rights. United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S.Ct.2464 (1977). The timeliness of a motion to intervene is

determined, not by reference to the date on which the suit began or the date on which the would- be intervenor learned that it was pending, but rather by reference to the date when the applicants learned that intervention was needed to protect their interests. NAACP v. New York, 413 U.S. 345, at 374, 93 S.Ct.2591 (1973).

Based on the record the petitioners were timely in their attempt to intervene. The District Court and the Appellate Court have placed unreasonable and unrealistic burdens upon the petitioners in assessing timeliness in this matter. First of all the entry of the consent decree in 1979 provided no basis to the petitioners to assume that intervention would be necessary to protect their rights. The 1979 decree permitted use of the eligibility list in rank order and provided that the list

should not be used beyond July 1, 1981 or beyond the 500th name. The one-for-one racial hiring was only to become operative out of necessity. Accordingly, the petitioners (assuming they had any knowledge of the decree at all) would not have assumed upon the entry of the decree that the list would be utilized beyond the 500th name. Moreover, in 1982, after the strike, when hiring from the list resumed on a one for one basis the white applicants remaining on the list could not reasonably have known that the list would be terminated, due to a claimed absence of minorities since the list at that time contained enough minority candidates to match up one-for-one with the remaining white candidates. More importantly, in the meantime the Union and the City had entered into a Union agreement which lead the petitioners to believe that intervention was not

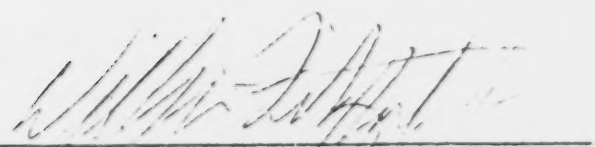
necessary to protect their rights and that they would be hired eventually with the passage of time.

It was not until March of 1985 when the City announced that it was terminating the list did the petitioners first became aware of the City's bad faith, and that the City did not intend to live up to the promises contained in the Union Agreement. Accordingly, intervention was timely and should have been granted considering the totality of the circumstances.

CONCLUSION

For the foregoing reasons the petitioners pray that this honorable Court issue a writ of certiorari to the Seventh Circuit Court of Appeals to review the case of United States of America v. City of Chicago 798 F.2d 969 (7th Cir. 1986).

Respectfully submitted,



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I hereby certify that a true and correct copy of the foregoing document has been forwarded by United States mail to the following counsel of record this 24th day of December, 1986:

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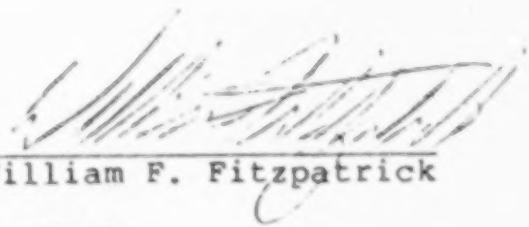

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APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellee,

APPEAL OF PETE O'SULLIVAN, *et al.*,

Petitioning-Intervenors.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 73 C 661—**Frank J. McGarr**, *Judge.*

ARGUED MAY 6, 1986—DECIDED AUGUST 14, 1986

Before CUDAHY and COFFEY, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

CUDAHY, *Circuit Judge.* Pete O'Sullivan and fourteen other white candidates for firefighter positions with the City of Chicago (the "Applicants") appeal from an order of the district court denying them leave to intervene in this lawsuit. We affirm.

I

This lawsuit was commenced in 1973, when the United States filed a complaint against the City of Chicago (the "City"), alleging that it was engaged in a pattern or practice of racial discrimination with respect to recruitment, hiring and promotion in the Chicago Fire Department, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Specifically, the United States contended that the City was using "qualifications, tests, and other selection standards as part of the initial hiring process" that had a disparate impact on black and Hispanic candidates and had not been validated as job-related. Complaint, *United States v. City of Chicago*, No. 73-C-661, ¶ 8(c), Appellants' Appendix at 3. On January 28, 1974 the parties entered into a Consent Decree that committed the City to "increase substantially the minority composition in the ranks of uniformed personnel within the Fire Department, so that it may become more representative of the racial and ethnic composition of the City as a whole." Amended Consent Decree at 3, Appellants' Appendix at 14. In pursuit of this goal, the City agreed to "adopt and seek to achieve a goal of hiring black and Spanish surnamed individuals for at least 50 percent of the uniformed personnel accepted annually for entry into the Fire Department for each of the next four years," *id.*

From 1974 to 1979 Chicago firefighters were hired pursuant to the terms of this Consent Decree. In 1978 the City administered Firefighters' Examination No. 8106. Those who passed the written examination, as well as a physical abilities test, were ranked on a list (the "8106 list") in order of their written examination scores. The test results showed an adverse impact on minority candidates[1] and the United States took the position that use

[1] Of 4132 whites who took the written examination, 1270 appeared on the 8106 list; 670 of 3286 black and Hispanic applicants made the list, as well as 39 of 136 listed as "other." Appellee United States' Brief at 4.

of the 8106 list would not be consistent with Chicago's long-range hiring goals under the 1974 Consent Decree. After further negotiations the parties agreed to, and on June 26, 1979, the district court entered, an "Agreed-to Injunctive Order in Resolution of Firefighter Hiring Issues" ("Agreed-to Injunctive Order"), which settled this lawsuit so far as firefighter hiring issues were concerned. The Agreed-to Injunctive Order recommitted the City to the long-range goals of the 1974 Consent Decree; it also set forth the conditions under which the City could hire from the allegedly discriminatory 8106 list. The City would be allowed to hire from the list in rank order, without regard to race or national origin, until July 1, 1981 or until the five-hundredth name on the list was reached, whichever occurred first. It was contemplated that the City would take steps to develop and validate a new firefighter selection procedure by this time. If, however, the City determined that the needs of the City required further hiring from the 8106 list, the Agreed-to Injunctive Order provided that such further hiring would be on the basis of one black or Hispanic applicant hired for every white applicant hired. Agreed-to Injunctive Order, Appellants' Appendix at 23-33.

The City did not have a new test prepared by the time the five-hundredth name on the list was reached.[2] Since February 1982, it has been hiring firefighters on the one-minority-for-one-white basis required by the Agreed-to Injunctive Order. At present, however, there are 374 white

[2] The City offered the district court the affidavit of Robert Joyce, Chicago's Deputy Commissioner of Personnel. Joyce explained that a firefighter strike in February 1980 required the City to hire eight hundred replacement firefighters so that the five-hundredth name was reached sooner than contemplated. Further, delay in creating a new test was caused both by the strike and the United States' suggestion that the City further analyze the impact of its selection procedures on women applicants. Joyce Affidavit, Appellants' Appendix at 91-94.

candidates on the list while no eligible[3] minority candidates remain. In March 1985 the City announced a new firefighters' examination and sent notification to all candidates still on the 8106 list, informing them that it was retiring this list and that if they still wished to be Chicago firefighters they would have to take the new test. (The test was administered on July 15, 1985.)

When they learned this, the Applicants filed a motion with the district court seeking leave to intervene in this lawsuit.[4] They asserted that the City was retiring the 8106 list, thus passing them over for firefighter positions on account of their race in violation of 42 U.S.C. §§ 1981 and 1983. The accompanying complaint in intervention asked the court to certify them as representatives of a class (all white candidates on the 8106 list as of March 1985); to enjoin the City from striking the list until all class members had been hired as firefighters; to declare unconstitutional and vacate the Agreed-to Injunctive Order; and to enter a judgment in the class' favor for one million dollars and other appropriate equitable relief. Applicants' Complaint, Appellants' Short Appendix at 16-21. The City and the United States[5] opposed the application on the ground that it was not timely.

The district court ruled that insofar as the Applicants sought to intervene to challenge the terms of the Agreed-to Injunctive Order, the application was untimely. Insofar as they sought to challenge only the retirement of the list, the district court ruled they had no protectable interest in the City's continued use of the 8106 list and

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[3] "Eligibility" in this sense appears to refer to whether an applicant can be found and pass a background test. *See* Appellee United States' Brief at 6.

[4] Pending disposition of their application, the Applicants also filed a motion for a temporary restraining order. This motion was heard and denied on April 4, 1985.

[5] The United States has altered its position and supports intervention before this court. *See infra.*

hence no basis for intervention. It denied the application to intervene and the Applicants appealed.

II

To intervene as of right[6] in a pending lawsuit, the Applicants must meet four requirements. They must show (1) that their application is timely; (2) that they have an interest in the "property or transaction" which is the subject of the action; (3) that the disposition of the action will impair or impede their ability to protect that interest; and (4) that their interest is not adequately represented by existing parties. Failure to satisfy any one of these requirements is sufficient grounds to deny an application. The district court did not consider the third and fourth requirements because it believed that all claims the Applicants could make were foreclosed by the first two. The Applicants argue on appeal that the district court erred (1) in finding that they have no protectable interest in this litigation and (2) in ruling that the application to intervene was untimely. We will address each of these contentions in turn.

A. The Applicants' Interest in this Lawsuit.

We note as an initial matter that the Applicants have not characterized the district court's assessment of their interest in this litigation with complete accuracy. The district court did not hold that the Applicants have *no* protectable interest at stake: it acknowledged that they have an interest in not being foreclosed from employment as

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[6] Intervention as of right is governed by FRCP 24(a):

> Upon timely application anyone shall be permitted to intervene in an action . . . when the application claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the application's interest is adequately represented by existing parties.

firefighters on account of their race but held that this interest goes directly to the terms of the Agreed-to Injunctive Order and was thus untimely asserted. *United States v. City of Chicago*, No. 73-C-661 (N.D. Ill. June 19, 1985), at 5-6. It did hold, however, that the applicants could not claim a protectable interest on any theory that would challenge the retiring of the 8106 list without at the same time challenging the terms of the Agreed-to Injunctive Order, *id.* at 6-10, and the Applicants dispute this conclusion as well.

The Applicants claim that the district court erred in finding that they do not have a property interest in the continued use of the 8106 list grounded in the terms of the 1982 collective bargaining agreement between the City and the firefighters' union.[7] Appellants note especially section 16.10 of the agreement, which reads:

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[7] The contract was ratified by the Chicago City Council and enacted as a City ordinance on March 30, 1982. It was to expire on December 31, 1983, but its provisions would remain in effect during the negotiation of a successor agreement.

On March 19, 1986, after the briefs in this appeal had been filed, both § 16.10 and Appendix I of the 1982 contract were abrogated as "moot" by an arbitrator's award issued in the course of contract negotiations. *City of Chicago Fire Fighters Union Local No. 2, AFL-CIO*, No. 51-39-0058-84-R. The City had offered as a reason for their deletion that "a recent decision of the United States District Court by Judge McGarr has affirmed the City's right to remove the 8106 list as the means to acquire new hires." Appellants' Supplemental Brief, Appendix at 1. One month later, the City ratified and adopted as a City ordinance a new collective bargaining agreement. This 1986 contract contained (pursuant to the arbitrator's award) no mention of the 8106 list. It was given a retroactive effective date of January 1, 1984.

The City sought and was granted leave to file a supplemental brief in this case. It argued that these developments moot the issue of the Applicants' purported property interest in prospective employment as Chicago firefighters. There was no longer any question of a "mutually explicit understanding between the parties" on this question, it contends, because "[t]he deletion of all reference to the 8106 list in the 1986 agreement, and its retroac-

(Footnote continued on following page)

> The employer will maintain the present eligibility roster number 8106 for the term of this agreement. All new employees will be called and offered employment from this list in the order of their original numerical rank unless a different priority is ordered by the Federal Court.
>
> In such event, in recognition of the mutual interest of the Employer and Union in promoting harmonious relations within the department that will assure effective assimilation of new employees into the Department, the Employer and Union have entered into the supplementary agreement attached hereto as Appendix I.

Collective Bargaining Agreement, § 16.10, Appellants' Appendix at 85. Appellants assert that this section gives them a property interest (in the form of a contract right) of which they may not be deprived without due process of law. We need not decide now whether an unconditional

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[7] *continued*

tive application to 1984, show that the parties intended the provisions which discuss the 8106 list to remain in effect no later than December 31, 1983 . . . ." Appellee City of Chicago's Supplemental Brief at 3. The City's argument is based on the fact that the 1982 agreement states that the City will retain the 8106 list "for the term of the agreement." The Applicants contend that this promise was breached when the City struck the list in March 1985. But the retroactive effect of the new contract shows, the City argues, that the parties meant "the term of this agreement" to mean "until December 31, 1983." Therefore, the Applicants had no property interest to assert in 1985.

We decline to embrace the City's reasoning because we have no evidence that the arbitrator made any such finding as to the parties' understanding as embodied in the 1982 contract. We only know that the City urged the arbitrator to rely on the district court's decision that the old contract created no interest and that the City could strike this list at any time. This, of course, is what we have been asked to determine on appeal. Under this set of facts we cannot say that this issue has lost its character as an actual controversy.

agreement for *prospective* employment gives rise to a protectable property right (all the cases cited by appellants concern the right to *continued* employment, *see, e.g., Board of Regents v. Roth*, 408 U.S. 564 (1972)) because whatever is promised in section 16.10 of this agreement is expressly conditioned upon the provisions of Appendix I of the agreement. Appendix I states that

> [T]he Employer and the Union agree to the following mutual undertakings with respect to maintaining the eligibility status and priority of persons on eligibility roster No. 8106 and the recruiting of minority applicants: (1) Eligibility Roster No. 8106 will be utilized to hire new employees until such time as such use conflicts with the terms of the order entered on June 21, [sic] 1979 by Judge McGarr [in this action.]

Collective Bargaining Agreement, Appendix I, Appellants' Appendix at 86. "To create a justifiable and reasonable expectation of job security, and thereby establish a property interest, there must be a mutually explicit understanding between the parties." *Hadley v. County of DuPage*, 715 F.2d 1238, 1242 (7th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984). There was no mutual agreement in this contract to keep the 8106 list until it was completely exhausted because once the minority names on the list were exhausted, use of the list would presumably "conflict[ ] with the terms of the order entered on June 21, 1979 . . . ." Thus, the district court did not err in holding that the collective bargaining agreement creates no interest entitling the Applicants to intervene in this suit.[8]

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[8] In their Reply Brief, the Applicants also point to section two of Appendix I, which addresses possible priority status on a new firefighter list for those remaining on the 8106 list in the event that the 8106 list can no longer be used under the Agreed-to Injunctive Order. This section cannot demonstrate a mutual agreement to continue to use the 8106 list; by its terms, it discusses what should happen after this list is retired. The issue of priority status is not before us on this appeal.

The Applicants also assert that their protectable interest in this litigation is a constitutional right to be free from "arbitrary and capricious" compliance on the City's part with the terms of the Agreed-to Injunctive Order. They argue that the City acted arbitrarily when it violated the terms of the Agreed-to Injunctive Order by hiring replacements during the 1980 firefighters' strike without regard to the one-to-one requirement and by hiring a few persons who were not on the list at all. The district court did not address this contention in its decision, probably because this position is not pleaded as a grounds for intervention in the application. (One paragraph is devoted to this allegation in the proffered complaint in intervention. Applicants' Complaint ¶ 14, Appellant's Short Appendix at 18.) In any event, it is difficult to see what interest the Applicants are seeking to advance with this allegation. It is undisputed that hiring during the strike was without regard to either race or rank on the list, which appears to make this hiring irrelevant to the claimed racial discrimination. More important, the Applicants concede that they were offered employment during the strike and refused because they did not choose to break the strike. Therefore, the only possible prejudice to the Applicants from the hiring during the strike was the likelihood that there would be fewer vacancies to be filled (and which would be filled on a one-to-one basis) after the strike. But the Applicants certainly knew this when they turned down the offer of employment.

In sum, we conclude that the district court was correct in ruling that the only interest that the Applicants have in this lawsuit results from their assertion that they are being denied employment as firefighters on account of their race. The question, then, is whether the district court abused its discretion in finding that this claim was not timely raised.

B. Timeliness.

As to the contention that retiring the 8106 list discriminates against the Applicants on account of their race, the district court ruled that the application for intervention was untimely. The question whether an application is timely is committed to the discretion of the district court; "unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York*, 413 U.S. 345, 366 (1973) (footnote omitted); *see also FDIC v. Hanrahan*, 612 F.2d 1051, 1053 (7th Cir. 1980). We note in this regard that Judge McGarr has been presiding over this case since 1978, was the judge who entered the Agreed-to Injunctive Order and is very well acquainted with the issues involved. In assessing the timeliness of this application to intervene, the court considered the proper factors: (1) the length of time the Applicants knew or should have known of their interest in the litigation; (2) the extent of prejudice to the existing parties if intervention were granted; (3) the extent of prejudice to the Applicants if intervention were denied; and (4) the existence of any unusual factors that militate for or against intervention. *See South v. Rowe*, 759 F.2d 610, 612 (7th Cir. 1985); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977).

The parties to this appeal contend most strenuously over the first of these factors—the length of time the Applicants knew or should have known of their interest in this suit. The City contends that the Applicants knew or should have known that their interest in being hired from the 8106 list in rank order was in jeopardy before or at the time the Agreed-to Injunctive Order was entered in 1979 and that they also knew or should have known at that time that the list would be discarded when it could no longer be used under the court order. The Applicants and the United States both assert that the application for intervention was timely but reach that conclusion in different ways.

The Applicants concede that they want to intervene to overturn the Agreed-to Injunctive Order. But the district court, they say, looked only to the date the Agreed-to Injunctive Order was entered in assessing timeliness and improperly ignored other circumstances affecting their awareness of a need to intervene to protect their interests. They argue that they knew in 1979 that they would not be hired in rank order but did not know, and had no reason to know until the City announced the new examination, that they would not be hired *at all*. In this regard, they point to the 1982 collective bargaining agreement, which they argue led them to believe that the City had undertaken to employ them eventually. "To be asked to give up your seat on the bus for another man is one thing, to be told to get off the bus entirely is quite another." Appellant's Brief at 13. However, as we noted *supra*, the collective bargaining agreement did not confer an unconditional right to employment. It expressly incorporated the terms of the Agreed-to Injunctive Order. Under the Agreed-to Injunctive Order, the City was free to discard the 8106 list as soon as it produced a new, validated examination and was bound to discard it when one-for-one hiring was no longer possible. Thus, the Applicants' analogy is not apt: they stood on the bus so that others might sit, but they did so with notice that everyone standing could be asked to debark at any time. The Applicants had notice when the Agreed-to Injunctive Order was entered that they might not be hired on account of their race.[9]

The United States' approach is somewhat different. It narrows the Applicants' protectable interest to a challenge to the discriminatory action of the City in striking the 8106 list because all remaining candidates were white. It

[9] Failing that, they might have intervened when the quota hiring started in February 1982. At that point, over three years before they actually sought intervention, the racial preferences they complain of actually started to be applied.

concedes that it is too late to challenge the terms of the 1979 Order and further concedes that the Applicants were on notice that the list could be struck (in favor of a new exam) at any time. It asserts, however, that intervention is timely on the single ground that the list is being retired for a racially discriminatory reason. The Applicants could not have known until the City announced that the list was being discarded that only white candidates would remain on the list at the time it was discarded.

The problem with this argument is that this very specific interest that the United States has isolated cannot support the weight the United States seeks to place upon it. The United States concedes that the Applicants could not prevail on this theory[10] because the City's actions were motivated not by racial animus but rather by the mandate of the district court. The City's action in retiring the list cannot be separated from the entire remedial scheme agreed to in 1979. The Agreed-to Injunctive Order expressly limited the City's use of an eligibility list that the United States at least then believed to be racially discriminatory. The parties settled their dispute and part of the compromise was that the only way in which the City could use the list after the five-hundredth name (or July 1, 1981) was according to the racial quota set forth in the Order. Thus, the Agreed-to Injunctive Order must

[10] This is the crux of the very novel intervention argument outlined by the United States. It argues that this one narrow grounds for intervention "lacks any merit" but nonetheless urges that the Applicants have articulated an interest sufficient to warrant intervention under FRCP 24(a). We call this argument "novel" because we do not see the merit in allowing intervention to assert a claim that (to use the United States' own description) "borders on the frivolous," Appellee United States' Brief at 18. We agree with the proposition that it would be error to deny intervention because of a belief that the intervenors, if put to their proof, could not prevail. But applicants for intervention as of right must be able to articulate a "significantly protectable interest" in the ongoing litigation, Fed. R. Civ. P. 24(a)(2); if they cannot state a legally cognizable claim, they cannot be said to have done so.

be read as requiring the City to stop hiring from the 8106 list when no minority candidates remained on the list to balance white hires. Any challenge to retiring the list because of its racial composition is of necessity a challenge to the terms of the Agreed-to Injunctive Order.

We entertained a similar argument (also on the part of the United States) in our recent case involving police department hiring, *United States v. City of Chicago*, Nos. 85-2027, 85-2056 (7th Cir. July 7, 1986). In that case, the City had announced that it was retiring a police department eligibility list from which it was hiring under the terms of a court-ordered quota system. A group of candidates sought to intervene on the ground that the list was being retired because of the race of the candidates still on the list. We affirmed the district court's decision denying intervention because the application was untimely, choosing not to embrace the United States' argument:

> The United States argues that the Baker petitioners' motion to intervene is timely because "they had no reason to expect that the list would be exhausted of black males before it was exhausted of white males and females." Since white males, females and minority males appeared on the eligibility list in roughly the same percentages, the United States argues, the Baker petitioners had reason to assume that no group would be exhausted before any other. But the fact that the Baker petitioners had some basis for assuming that they would ultimately be hired does not justify their waiting until this assumption was proved false to intervene. They knew their interests were compromised when the quotas for the 1981 exam were introduced and the rank ordering of scores—which favored nonminorities and had a disparate impact against minorities—was disregarded.

Id., slip op. at 8 n.7. There, under substantially the same facts, we held that the interest in the list's retirement could not be separated from the interest in the quota system which first compromised the applicants' claims. *Id.*

at 8-9. Here, too, it was no abuse of discretion for the district court to have decided that the Applicants knew or should have known of their interest in this lawsuit substantially before March of 1985.

We also agree with the district court's assessment of the balance of the hardships. The City currently has a five-year old firefighter hiring list[11] from which it cannot hire without breaching the settlement it entered with the United States in 1979. It has developed a new, nondiscriminatory firefighter examination and has already administered it to some twenty-thousand new applicants. The City has a very great interest in discarding the 8106 list without becoming involved in protracted litigation.[12] We sympathize with the Applicants, who are experiencing a great personal disappointment and feel as if they have been treated very unfairly by the City and the United States. They are not, however, barred from retaking the test and being placed on a new eligibility list. Their situation is unfortunate but we do not think that the district court abused its discretion in ruling that the City would suffer greater prejudice if intervention were granted than the Applicants would suffer were it denied.

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[11] By way of comparison, City of Chicago personnel rules call for keeping such lists for one year. City of Chicago Personnel Rule VII, § 3(d).

[12] The United States downplays this concern, arguing that it and the City would not be greatly prejudiced "because the intervenors' allegation is so lacking in merit that the district court would be able to enter judgment against them expeditiously." Appellee United States' Brief at 22. We are not so sanguine as the United States about the ease of the issues involved. A constitutional challenge to the terms of the 1979 Agreed-to Injunctive Order would be a complicated matter, especially in light of the unsettled state of the law in this area. Further, we once again believe that the United States is being highly inconsistent: if the district judge will be able to summarily dismiss the Applicants' claim as meritless (as the United States assures us, *see supra* note 10), how can we say that the Applicants are greatly prejudiced by the district court's order denying intervention?

Finally, the Applicants cite several "unusual circumstances" which they contend militate in favor of allowing them to intervene. They point to the City's delay in formulating and validating a new examination and to the firefighter strike, which required the City to start quota hiring earlier than contemplated. As we explained above, neither of these unexpected occurrences excuses the Applicants' failure to intervene earlier. Applicants also consider the very nature of the Agreed-to Injunctive Order an unusual circumstance, in that "for over 12 years the City and the Justice Department have by agreement imposed racial quotas on the City without any finding that the City's hiring practices were discriminatory." Appellants' Brief at 18-19. The strength of this argument has been weakened by the Supreme Court's recent decision in *Local 93, International Ass'n of Firefighters v. City of Cleveland*, No. 84-1999 (U.S. July 2, 1986). In any event, it does not serve to excuse the Applicants' tardiness; if anything it points up why the Applicants ought to have sought intervention much sooner.

After examining the factors applied by the District Court we cannot say that it abused its discretion in ruling that the application to intervene was untimely. Therefore, the judgment of the district court is AFFIRMED.

A true Copy:

Teste:

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 26, 1986

Before
Hon. Richard D. Cudahy, Cir.Judge
Hon. John L. Coffey, Cir. Judge
Hon. Jesse E. Eschbach, Senior Judge

UNITED STATES OF AMERICA
Plaintiff-Appellee
No. 85-2245 vs.

CITY OF CHICAGO
Defendant-Appellee
APPEAL OF PETE O'SULLIVAN, ET AL
Petitioning-Intervenor

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above entitled cause by the appellants, Pete O'Sullivan, et al., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 73 C 661
	)	
CITY OF CHICAGO, ET AL.,	)	

MEMORANDUM OPINION AND ORDER

This cause is before the court on the application of several white males remaining on the 8106 Firefighters Eligibility List ("the O'Sullivan applicants") for leave to intervene in this action and the motion of the Chicago Fire Fighers Union Local No. 2 ("the Union") for an order providing priority status for persons on the 8106 Firefighters Eligibility List ("the 8106 List"). For the reasons contained herein, both motions are denied.

The United States brought this suit in 1973 alleging that the City of Chicago

("the City") was engaged in a pattern or practice of discrimination within the Fire Department based upon race and national origin against blacks and hispanics. The United States, alleging that the City was using invalid procedures for selecting firefighters, sought to require the development of valid selection procedures. This court entered an agreed-upon injunctive order, pursuant to the joint motion of the United States and the City, on June 26, 1979, which settled that aspect of ths case concerning the manner in which the City hired firefighters. Included within that order were directions regarding the subsequent use of the 8106 List which had been compiled on the basis of the Firefighters Examination No. 8106. That order permitted the City to continue to use the 8106 List subject to certain

specified conditions. The agreed order stated that the 8106 List:

> ...shall not be further used beyond July 1, 1981 or after the 500th name on the list has been reached, whichever occurs first, provided that if the defendants determine that the needs of the City of Chicago require further hiring from the [8106 List], such further hiring shall be on the basis of one black or Spanish-surnamed applicant hired for every white applicant hired.

The City has used the 8106 List to hire firefighters until recently. At the present time, no eligible minority candidates remain on the 8106 List; only 374 white candidates remain. The City has scheduled a new examination from which it plans to prepare a new eligibility list. In the event the City proceeds with its plans, those persons remaining on the 8106 LIst, if they want to become firefighters, will be required to take the new examination. The City's proposed action is opposed by the Union

and the white candidates remaining on the 8106 List, allegedly represented by the O'Sullivan applicants.

In their application to intervene, the O'Sullivan applicants assert that the City's move to strike the 8106 List is due to the fact that the City is unable to locate any more qualified eligible minority candidates on the 8106 List to match with eligible white candidates. Thus, they argue that they are being by-passed on the 8106 List solely on the basis of their race, will be deprived of employment by reason of their race, and will be deprived of rights secured to them under the Fourteenth Amendment to the United States Constitution in violation of 42 U.S.C. Section 1981 and 1983.

Both the City and the United States contend that the application to intervene must be denied because it is not timely

filed. A party will be given leave to intervene only upon filing a timely application. Fed. R. Civ. P. 24. In determining the timeliness of an application to intervene, the court must consider the length of time the potential intervenors knew or reasonably should have known of their interest in the litigation, the extent of prejudice to existing parties if the application is granted, the extent of prejudice to the movants if the application is denied, and the existence of unusual circumstances which militate for or against intervention. Stallworth v. Monsanto Co., 558 F.2d 257, 264-66 (5th Cir. 1977).

Insofar as the O'Sullivan applicants seek to intervene for the purpose of challenging the provisions of the agreed order, it is clear to this court that their application is untimely. The

O'Sullivan applicants all took the 1978 firefighters examination and accordingly, were placed on the 8106 List in rank order. In 1979, this court entered the agreed order which directly affected the manner in which the City could use the 8106 List to hiring firefighters. This case and the terms of the agreed order were highly publicized, generating a great deal of media attention. It is doubtful that the O'Sullivan applicants were unaware of the agreed order's effect on the 8106 LIst and they do not contend that just recently they have become knowledgeable about the order's contents. Thus, the O'Sullivan applicants knew or reasonably should have know of their interest in this litigation and in the terms of the agreed order long before their current application to intervene was filed.

The second factor to consider, the extent of prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenors' failure to apply for intervention as soon as they knew or should have known of their interest in this case, militates in favor of a finding that the O'Sullivan applicants' motion is untimely. The terms of the agreed order clearly contemplated a limited use of the 8106 List until a valid selection proceed could be developed. It specifically set forth how and in what circumstances the City could use the 8106 List. For the past six years the City's hi- practices have been subject to the terms of the agreed order. The intervention of the O'Sullivan applicants at this late date in order to challenge the provisions of the agreed order would undo the work which was completed six years ago,

threatening the parties with the prospect of further protracted litigation.

In contrast, the prejudice to the would-be intervenors if their application is denied is not so great. As will be discussed more fully, below, the O'Sullivan applicants have no right to the continued use of the 8106 List. Although this court is not unsympathetic to the problems which the long and tortured history of the 8106 List has caused, this court cannot say that denial of the applicaiton to intervene is prejudicial to the O'Sullivan applicants.

Finally, this court finds that no unusual circumstances are present which would weigh in favor of granting leave to the O'Sullivan applicants to intervene in order to challenge the provisions of the agreed order. Although the O'Sullivan applicants list a number of unusual factors in this case -- the extremely

long delay by the City in implementing the provisions of the agreed order, the interference of a firefighters strike, and the City's alleged hiring of individuals off the street without regard to the one-to-one hiring requirement in violation of the agreed order--none of them militate in favor of intervention so as to permit the O'Sullivan applicants to attack the terms of the agreed order. Not one of the factors excuses or explains the O'Sullivan applicants' failure to seek to intervene when they first knew of their interest in this litigation.

This court's examination of the four factors relevant to a determination of whether an application to intervene is timely mandates a finding that insofar as the O!Sullivan applicants seek leave to intervene to challenge the agreed order, their application is untimely.

Fundamentally, their contention that intervention is warranted because they have been denied employment due to their race, in that the City wants to strike the 8106 List because there are no more minority candidates remaining on the List, is a challenge to the provisions of the agreed order. The agreed order conditioned the use of the 8106 List beyond July 1, 1981, or after the 500th name on the list was reached upon the City's hiring one minority must first determine whether the O'Sullivan applicants have an interest in the continued use of the 8106 List which would give them a right to intervene in this action or which would persuade this court to give them leave to intervene pursuant to this court's discretion. Specifically, as this court noted on April 4, 1985, this court is concerned with whether the City's "delay in

implementing the consent decree and their delay in giving a new exam and creating a new list which they could have done quite legitimately in 1981 has caused [the O'Sullivan applicants] to be put in a position where they have been deprived of some genuine right." Unless the O'Sullivan applicants have a right in the continued use of the 8106 List, their intervention in this matter would serve no useful purpose and would not be warranted because the disposition of this action in their absence would not affect an interest which they have in the subject matter of the litigation.

The law of Illinois does not recognize a right on behalf of a person on a public employment list to the continued use of that list until all persons on the list have been hired. United States v. City of Chicago, 567 F.2d 730, 733 (7th Cir. 1977). Under the

City's personnel rules, employment eligibility lists in Chicago have a life of one year unless the Commissioner of Personnel otherwise determines. City of Chicago Personnel Rule 7, Section 3(d). Because the 8106 List has been in existence for over one year, the persons remaining on the 8106 List have no right, under the law of Illinois, to the 8106 List's continued use.

The O'Sullivan applicants contend, however, that a property interest was created when the Union and the City entered into a labor agreement in March, 1982. The Union makes a similar contention in its motion for an order granting priority status to the persons remaining on the 8106 List. The labor agreement was enacted as a City ordinance and is still in effect. It provides that the City will maintain the 8106 List for the term of the agreement and that all

new employees will be called and offered employment from the 8106 List in order of their original numerical rank unless a different prioirty is ordered by this court. The supplementary appendix to the agreement which concerns the 8106 List provides that the 8106 List "will be utilized to hire new employees until such time as such use conflicts with the terms of the order entered on June 21 (sic), 1979" by this court in this case. In the event that during the term of the agreement the 8106 List could not be used to hire new employees in compliance with the terms of the agreed order, the supplementary appendix sets forth the manner in which the City and the Union would resolve their dispute concerning what priority could be given to persons who were not hired from the 8106 List.

The Union argues that the agreement created a property right in the persons

remaining on the 8106 List to be hired as firefighters in rank order from the 8106 List. The Union also asserts that the agreement created a right in those persons to continuing eligibility for employment without reapplication and reexamination and to priority status on a subsequent employment roster. Consequently, the Union claims that this court should order that the City continue to hire persons from the 8106 List and that as such time the 8106 List is replaced, those persons remaining on the 8106 List be given priority over persons on a subsequent roster.

The agreement between the Union and the City could not create a right on behalf of any person remaining on the 8106 List to the List's continued use if such used conflicted with the agreed order. In fact, the agreement explicitly limited the use of the 8106 List until

such time as its use would conflict with the agreed order. The agreed order envisioned the retirement of the 8106 List prior to the exhaustion of all the names on the List; it contemplated use of the List after July 1, 1981, or after the 500th name on the List had been reached only as long as minority candidates were on the List so as to accomodate one-to-one hiring. Therefore, the consent decree requires the retirement of the 8106 List. Because the 8106 List can no longer be used without conflicting with the agreed order, the O'Sullivan applicants have no right to the continued use of the 8106 List and no interest in this litigation sufficient to warrant their intervention. For the same reason, this court denies the Union's motion for an order that the City continue to use the 8106 List.

This court also denies the Union's motion for an order granting priority status to those persons who have not been hired from the 8106 List. This court uses the term "priority status" to indicate that status which would entitle persons who remain on the 8106 List to be hired before persons on a subsequent employment roster could be hired. Not only would such an order, in effect, accomplish the same thing as ordering the continued use of the 8106 List, and therefore, conflict with the consent decree, but the language of the Union's agreement with the City does not support such a claim.

It cannot be said that the agreement between the City and the Union created a property right or legitimate expectation on behalf of the persons remaining on the 8106 List to to the continued use of the List or for priority status. More than a

unilateral expectation is required to create a property interest; the claimant must have a legitimate claim of entitlement to the benefit. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). There must be a mutually explicit understanding between the parties before a claim of entitlement to public employment will be created.

Hadley v. County of DuPage, 715 F.2d 1238, 1242 (7th Cir. 1983), cert. denied, 104 S.Ct. 1000 (1984). The labor agreement, however, demonstrates that the parties did not have a mutually explicit understanding that the names on the 8106 list must be exhausted. The labor agreement required the continued use of the List only as long as it did not conflict with the agreed order. The parties recognized a conflict between themselves regarding what priority status could be given to the 8106 candidates

within the terms of the agreed order. In addition, the City made clear its position concerning the maximum priority which could be afforded under the agreed order--which was that upon reapplication by a 8106 condidate, the City would apply the better of the persons's scores on the physical performance part of the test for the purpose of determining employment eligibility or ranking between candidates and the City would waive the age requirement. Because the labor agreement does not indicate a mutually explicit understanding between the parties that the persons remaining on the 8106 List would be hired from the List or would remain eligible for employment without submitting to reapplication or reexamination, the agreement cannot create such property rights.

It is often said that hard cases make bad law. To indulge one's natural

sympathy for the intervenors' plight in this case, would bear out this adage. What has happened in this case is that bad law has made a hard case.

The 1979 decree, which controls the outcome of this petition to intervene and this motion, was an affirmative action agreement. Promotions should be on merit alone; no other basis for advancement is logically defensible. Affirmative action, though sanctioned by law, ignores this truth, and the consequent distortion of fair hiring practices is the price we are paying.

The consent decree of 1979 was, however, arrived at by the parties, approved by the court, and has governed this situation for six years. It was consistent with decisional law then and now. It has been and is the governing law between the parties.

In summary, the O'Sullivan applicants' petition to intervene is untimely insofar as it seeks to challenge the provisions of the agreed order. Because the O'Sullivan applicants have demonstrated no right to the continued use of the 8106 List, they have no interest in the litigation sufficient to warrant intervention in this case in order to oppose the City's plan to strike the 8106 List, hold a new examination, and formulate a new eligibility roster. The Union has failed to establish any property right or ligitimate expectation in the persons remaining on the 8106 List for continued use of the List or for providing priority status to the persons on the 8106 List. Moreover, to continue to use the 8106 List, they have no interest in the litigation sufficient to warrant intervention in this case in order to oppose the City's plan to strike

the 8106 List, hold a new examination, and formulate a new eligibility roster. The Union has failed to establish any property right or legitimate expectation in the persons remaining on the 8106 List for continued use of the List or for providing priority status to the persons on the 8106 List. Moreover, to continue to use the 8106 List or to grant priority status to the persons remaining on the 8106 List would contravene the agreed order. Therefore, the application of the O'Sullivan applicants to intervene is denied and the motion of the Union for an order for the continued use of the 8106 List or to provide priority status to persons on the 8106 List is denied.

ENTER:

_____

U.S. DISTRICT JUDGE

DATED: June 19, 1985

Section 16.10 Firefighter Employment List

The Employer will maintain the present eligibility roster No. 8106 for the term of this Agreement. All new employees will be called and offered employment from this list in the order of their original numerical rank unless a different priority is ordered by the Federal Court.

In such event, in recognition of the mutual interest of the Employer and Union in promoting harmonious relations within the Department that will assure the effective assimilation of new employees into the Department, the Employer and Union have entered into the supplementary agreement attached hereto as Appendix I.

Section 16.11 Training

A. The Employer and Union are committed to the principle of training for all employees in order to improve the efficiency and effectiveness of the Fire Department. Said training shall be provided insofar as it does not adversely affect and interfere with the orderly performance and continuity of municipal services within the Fire Department. Training shall be scheduled by the Fire Commissioner or his designee. Employees will attend training sessions during their normal hours of duty, as assigned by the Employer. Training will be scheduled in a manner which does not undermine or erode the minimum manning standards established in this agreement.

B. The Employer and Union shall each name three (3) representatives to a training committee. Such committee shall meet and discuss ways to improve training and may, by mutual agreement, make recommendations to the Fire Commissioner. The Commissioner shall promptly issue a report as to his views as to the Committee's recommendation. Members of the training committee shall be provided with access to training materials and curriculum, and shall be allowed to monitor training sessions on their off days conducted prior to or concurrent with the training committee's meetings in order to facilitate the committee's work.

ARTICLE XVII
RULES AND REGULATIONS

Section 17.1

A. The Union agrees that it and its members shall comply, in full, with all Fire Department Rules and Regulations and Practices and Procedures that are not in conflict with the provisions of this Agreement.

B. The Employer shall name three representatives and the Union shall name three representatives to sit as a committee to review the existing Fire Department rules and regulations. Such committee shall meet promptly and may by mutual agreement make recommendations to the Fire Commissioner. The Fire Commissioner shall promptly issue a report as to his views as to the committee's recommendations.

2C

APPENDIX I
SUPPLEMENTARY AGREEMENT
(ELIGIBILITY LIST 8106)

2C

In recognition of the undersigned parties mutual interest in promoting harmonious relations within the Department that will assure the effective assimilation of new employees into the Department, the Employer and the Union agree to the following mutual undertakings with respect to maintaining the eligibility status and priority of persons on eligibility roster No. 8106 and the recruiting of minority applicants:

1. Eligibility roster No. 8106 will be utilized to hire new employees until such time as such use conflicts with the terms of the order entered on June 21, 1979 by Judge McCarr in U.S. v City of Chicago, 73 C 661.

2. If during the term of the Contract eligibility roster No. 8106 cannot be utilized to hire new employees in compliance with the terms of such court order the priority status of persons on eligibility roster No. 8106 who have not yet been hired shall be resolved as follows:

a) The parties acknowledge that an actual controversy presently exists between them as to the priority status that may be approved for such persons consistent with applicable law;

b) It is the position of the Employer that the maximum priority status that may be afforded such persons under applicable law is as follows:

Persons previously on such roster not yet hired shall have the right to apply for the new eligibility roster and to have the better of the scores obtained on either the physical performance test administered for eligibility roster No. 8106 or on the physical performance test administered for the new eligibility roster for purposes of determining their employment eligibility status or ranking as among and between all candidates for the new Firefighters eligibility roster. Age requirements shall be waived by the Employer with regard to any person on eligibility roster No. 8106 who applies for the next succeeding eligibility roster.

c) It is the position of the Union that the present eligibility and priority status of persons on eligibility roster No. 8106 may be preserved in relation to future applicants who are not members of a minority group without contravening applicable law. Such priority status entitles persons presently on the roster to be called and offered employment in the order of their numerical rank on the list subject to the one to one minority hiring ratio established by the court order entered on June 26, 1979.

d) The Employer does not object to affording persons on eligibility roster No. 8106 the priority status proposed by the Union provided such action does not contravene applicable law.

e) The Employer agrees to support the right of the Union to intervene in any action or proceeding which affects the status of any person presently on eligibility roster No. 8106 and to provide the Union with notice of any action or court proceeding initiated by the City or any party which affects such status. The Employer and the Union agree to abide by which ever position is judicially sustained.

3. Notwithstanding the existence of the above described controversy the parties agree that the Employer will utilize the IAFF Labor Recruitment Program for the purpose of recruiting minority applicants for employment and placement on a new eligibility roster. The City and the Union agree to share equally the cost of salary and travel expenses of the IAFF personnel necessary to implement the Program. Additional staff for the Program will be drawn from existing City personnel.

4. The Employer agrees to provide the Union with all relevant information concerning persons hired off eligibility roster No. 8106.

5. The Employer and the Union will meet jointly and with representatives of the U.S. Department of Justice at mutually agreeable times for the purpose of implementing and monitoring the progress of the recruitment Program. The target date for the implementing the IAFF recruitment Program shall be March 1, 1982.

JANE M. BYRNE, Mayor,
City of Chicago

FRANK MUSCARE,
President, Chicago Firefighters Union, Local 2

STANLEY J. GARBER,
Corporation Counsel,
City of Chicago

J. DALE BERRY,
Attorney for Chicago Firefighter Union,
Local 2

APPENDIX "D"

EXCERPTS FROM THE 1974 CONSENT DECREE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 73 C 661
CITY OF CHICAGO, a municipal corporation; Robert J. Quinn, Commissioner, City of Chicago Fire Department; and William E. Cahill, Reginald DuBois, Quentin J. Goodwin, Commissioners, City of Chicago Civil Service Commission,	)	
	)	
Defendants.	)	

AMENDED CONSENT DECREE

The United States filed its complaint herein alleging that the defendants were engaged in a pattern or practice of discrimination, based on race and national origin, in hiring for and promotion within the City of Chicago Fire Department in violation of Title VII of

the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., as amended by the Equal Employment Opportunity Act of 1972, Public Law 92-261 (March 24, 1972); the Fourteenth Amendment to the Constitution of the United States; 42 U.S.C. Section 1981; and 42 U.S.C. Section 1983. The defendants filed an answer denying the allegations of the complaint.

The Plaintiff then moved for a preliminary injunction against the hiring of firefighter candidates from a Civil Service eligibility list based upon the 1968 firefighter examination. After a hearing on the motion, this Court denied the requested preliminary injunction by a decision dated March 21, 1973.

Subsequently, the plaintiff filed a notice of appeal to the Court of Appeals and requested an injunction pending the appeal. The Court of Appeals, over the

City's objection, granted the injunction pending appeal and expedited the briefing and oral argument schedule.

The parties, being desirous of resolving this case without the delay of further litigation, including further hearings and appellate review, have agreed to entry of the Consent Decree. In consideration thereof, it is hereby ORDERED, ADJUDGED, and DECREED:

1. Inasmuch as the defendant City agrees as a matter of policy not to engage in any act or practice which has the purpose or effect of discriminating against any employee of, or any applicant or potential applicant for employment with the Chicago Fire Department because of such individual's race, color or national origin it hereby consents to the entry of an order permanently enjoining such conduct and the defendants are hereby so ordered and enjoined. This

does not constitute an adjudication or finding of discrimination against the defendant City. Also, the City maintains its denial of any act or practice of discrimination.

2. The defendant City shall as a long range goal seek to recruit and hire blacks and Spanish surnamed persons in sufficient numbers so as to increase substantially the minority composition in the ranks of uniformed personnel within the Fire Department, so that it may become more representative of the racial and ethnic composition of the City as a whole. In order to achieve this long range goal, the defendants shall adopt and seek to achieve a goal of hiring black and Spanish surnamed individuals for at least 50 percent of the uniformed personnel accepted annually for entry into the Fire Department for each of the next four years. This long range goal

and the interim hiring goal shall be subject to the availability of qualified black and Spanish surnamed applicants. The plaintiff agrees that the hiring goal is limited by the number of vacancies in the Fire Department. In no case shall defendant be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to met the goal, nor shall the City apply any standard for employment which does not validly measure qualifications required for the job of firefighter.

****

(BALANCE OF DECREE DELETED)

****

APPENDIX "E"

EXCERPTS FROM THE 1979 CONSENT DECREE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 73 C 661
	)	
CITY OF CHICAGO, et al,	)	
Defendants.	)	

AGREED-TO INJUNCTION ORDER IN RESOLUTION
OF FIREFIGHTER HIRING ISSUES

Pursuant to the Court's Memorandum of Opinion and Supplemental Order on Firefighter Hiring, entered on September 12, 1978, the defendants have submitted to the United States a new (1979) Firefighters Eligibility List, compiled on the basis of Firefighter Examination No. 8106, along with various materials concerning the racial and national origin composition of the list and the validity of the selection process.

The United States has reviewed the 1979 Firefighter Eligibility List and accompanying materials and, on the basis of that review, has raised questions with the defendants concerning the list and the results and validity of the selection process. These questions have been fully and frankly discussed by the United States and the defendants. On the basis of these discussions, and despite the position of the United States that the 1979 Firefighter Eligibility List is not consistent with the defendants' long range goal obligations under the 1974 Amended Consent Decree, the United States and the defendants have agreed that the interests and objectives of each will be best served by the entry of this Order in Resolution of Firefighter Hiring Issues. Accordingly, they have jointly moved the Court for the entry of this Order, and,

On the basis of the representations made by the United States and the defendants, through their counsel, as well as all pleadings, memoranda, affidavits, and evidence previously on record in this cause, the Court finds that the entry of this Order will serve the ends of justice and that this Order should accordingly be entered.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, City of Chicago, et al., and each of them, their officers, officials, employees, successors in office, and all persons or organizations in active concert of participation with them shall remain permanently enjoined and restrained from discriminating against any applicant, candidate, cadet, or trainee for or holder of the position of Firefighter with the Fire Departmernt of the City of Chicago on the basis of race

or national origin and from failing or refusing to fully comply with and implement the provisions of this Order.

1. Long Range Goal. The defendants are and remain bound by the long range goal of the 1974 Amended Consent Decree with, inter alia, provided: "The defendant City shall as a long range goal seek to recruit and hire black and Spanish-surnamed persons in sufficient numbers so as to increase substantially the minority composition in the ranks of uniformed personnel within the Fire Department so that it may become more representative of the racial and ethnic composition of the City as a whole."

2. The 1979 Firefighter Eligibility List.

a. Effective July 1, 1979, the defendants may make operational use of the 1979 Firefighter Eligibility List for

purposes of rank order hiring therefrom, subject to the conditions and limitations set forth in paragraphs 2(b) and 2(c) below.

b. Upon credible evidence of any fraudulent conduct having occurred or having been attempted for the purpose of procuring the placement or ranking of any applicant on the 1979 Firefighter Eligibility List, to which fraudulent conduct the applicant was a party or had knowledge, that applicant's name shall be stricken or otherwise removed from the eligibility list, subject to all rights as such applicant may have to appeal such action under any State or local law, ordinance, or regulation.

c. The 1979 Firefighter Eligibility List shall not be further used beyond July 1, 1981 or after the 500th name on the list has been reached, whichever occurs first, provided that if

the defendants determine that the needs of the City of Chicago require further hiring from the 1979 Firefighter Eligibility List, such further hiring shall be on the basis of one black or Spanish-surnamed applicant hired for every white applicant hired.

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(BALANCE OF DECREE DELETED)

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Supreme Court, U.S.
FILED
MAR 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1065

In the Supreme Court of the United States

OCTOBER TERM, 1986

PETE O'SULLIVAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
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Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1065

PETE O'SULLIVAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court below erred in affirming the district court's denial of their motion to intervene as untimely.[1]

1. In 1973, the United States commenced this lawsuit, alleging that the City of Chicago had discriminated in hiring and promoting blacks and Hispanics for its fire department (Pet. App. 2A, 1B-2B). In 1974, the parties entered into a consent decree, wherein the City agreed to "increase substantially the minority composition in the ranks of uniformed personnel within the Fire Department, so that it may become more representative of the racial and ethnic composition of the City as a whole" (*id.* at 4D). To achieve this goal, the City agreed to "adopt and seek to achieve a

[1] Petitioners also contend (Pet. 12-17) that the Equal Protection Clause prohibits a public employer from entering into a consent decree which provides for racial preferences in hiring. Because petitioners were not allowed to intervene, neither court below addressed this contention. Accordingly, the issue is not properly before this Court and we do not address it here.

goal of hiring black and Spanish surnamed individuals for at least 50% of the uniformed personnel accepted annually for entry into the Fire Department for each of the next four years" (*ibid.*; see also *id.* at 2A). This consent decree governed the City's hiring of firefighters from 1974 to 1979 (*ibid.*).

In 1978, the City began administering a written examination to applicants for firefighter positions (Pet. App. 2A). Candidates who passed that examination and a physical abilities test were placed on a ranked list—called the "8106 list"—from which firefighters were then hired (*ibid.*). The 8106 test results had an adverse impact upon minorities, however, and the United States insisted that its use was inconsistent with the long-range hiring goals established by the 1974 consent decree (*id.* at 3A). Accordingly, the parties negotiated, and on June 26, 1979, the district court approved, an "Agreed-to Injunctive Order" (Pet. App. 2A-3A, 2B), wherein the City recommitted itself to the long-range goals of the 1974 consent decree (*id.* at 3A) and promised to cease hiring from the 8106 list after July 1, 1981, or after the 500th name on the list was reached, whichever occurred first (*ibid.*).[2] As a contingency, however, the Order further provided that the City could continue to use the 8106 list after the agreed time if, but only if, it hired on a one minority-for-one white basis (*ibid.*).

Because of large hiring needs attributable to a strike, the City failed to develop a new selection procedure by the time the 500th name on the 8106 list was reached (Pet. App. 3A). Accordingly, in February 1982, the City began hiring firefighters from the 8106 list on the one minority-

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[2] By this time, the parties anticipated that the City would have developed and validated a new firefighter selection procedure and thus would be permanently to retire the 8106 list. Pet. App. 3A.

for-one white basis (*ibid.*). It continued to do so until March 1985, when it announced that a new examination had been developed and that the 8106 list was to be retired (*id.* at 3A-4A). The City further notified the 374 remaining candidates on the 8106 list, all of whom were white, that they would have to take the new test if they wished to be hired as firefighters (*id.* at 4A).

2. Petitioners, 15 white individuals who remained on the 8106 list, then moved to intervene in the district court (Pet. App. 4A). Their application alleged that the City's decision to retire the 8106 list was racially motivated and thus unconstitutionally deprived them of firefighter positions (*ibid.*). They asked the court to certify them as representatives of all white candidates on the 8106 list as of March 1985, to enjoin the City from retiring the list until all class members had been hired as firefighters, to declare the Agreed-to Injunctive Order unconstitutional, and to enter a judgment in the class's favor for one million dollars (*id.* at 4A, 4B).

The district court denied their application to intervene (Pet. App. 1B-21B).[3] It found that, insofar as petitioners sought to challenge the provisions of the 1979 Agreed-to Injunctive Order, their motion was untimely, reasoning that petitioners "knew or * * * should have known of their interest in this litigation and in the terms of the agreed order long before their current application to intervene was filed" (*id.* at 6B), that "intervention * * * at this late date * * * would undo the work which was completed six years ago, threatening the parties with the prospect of further protracted litigation" (*id.* at 7B-8B), that "the prejudice to the would-be intervenors [from] their application

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[3] Portions of two paragraphs of the district court's opinion are omitted from the appendix to the petition. See Pet. App. 10B. The two paragraphs are printed in their entirety in the addendum to this response. The material deleted from the appendix to the petition is italicized.

[being] denied [was] not so great" (*ibid.*), and that "no unusual circumstances [were] present which would weigh in favor of granting leave * * * to intervene" (*id.* at 8B).[4] And it further found that, insofar as they sought to challenge the retirement of the 8106 list, petitioners had "no right to the continued use of the 8106 List and [thus] no interest in this litigation sufficient to warrant their intervention" (*id.* at 15B).[5]

3. The court of appeals affirmed (Pet. App. 1A-15A). It held that "the only interest [petitioners] have in this lawsuit results from their assertion that they are being denied employment as firefighters on account of their race" (*id.* at 9A).[6] And it rejected arguments by petitioners and the United States that the district court had abused its discretion in finding that petitioners failed to raise this interest in a timely fashion (*id.* at 10A-14A).

Petitioners argued to the court that, while "they knew in 1979 that they would not be hired in rank order," they "did not know, and had no reason to know until the City announced the new examination, that they would not be hired *at all*" (Pet. App. 11A (emphasis in original)). But the court found that, under the terms of the Agreed-to In-

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[4] The court derived this four-part test from *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977).

[5] The court also denied the motion of the Chicago Firefighters Union Local No. 2 for an order requiring the City to continue using the 8106 list (Pet. App. 15B), or to grant priority status to those remaining on the list (*id.* at 16B-18B). The Union did not appeal these rulings.

[6] The court rejected petitioners' claim that the collective bargaining agreement between the City and the firefighters' union gave them a property interest in the continued use of the 8106 list. Pet. App. 6A-8A. And it found that petitioners did not have any interest in being free from " 'arbitrary and capricious' " compliance by the City with the provisions of the Agreed-to Injunctive Order (*id.* at 9A).

junctive Order, "the City was free to discard the 8106 list as soon as it produced a new, validated examination and was bound to discard it when one-for-one hiring was no longer possible" (*ibid.*). Thus, it agreed with the district court that petitioners "had notice when the Agreed-to Injunctive Order was entered that they might not be hired on account of their race" and, accordingly, that their motion to intervene was untimely (*ibid.* (footnote omitted)).

The United States, by contrast, conceded in the court of appeals "that it [was] too late to challenge the terms of the 1979 Order and * * * that [petitioners] were on notice that the list could be struck (in favor of a new exam) at any time" (Pet. App. 12A).[7] It argued, however, "that intervention is timely on the single ground that the list [was] being retired for a racially discriminatory reason" (*ibid.*), reasoning that petitioners "could not have known until the City announced that the list was being discarded that only white candidates would remain on the list at the time it was discarded" (*ibid.*). But the court rejected this argument too, finding that "the very specific interest that the United States has isolated cannot support the weight the United States seeks to place upon it" (*ibid.*), that the "City's action in retiring the list cannot be separated from the entire remedial scheme agreed to in 1979" (*ibid.*), and that "[a]ny challenge to retiring the list because of its racial composition is of necessity a challenge to the terms of the Agreed-to Injunctive Order" (*id.* at 13A). Thus, the court held "it was no abuse of discretion for the district court to have decided that the [petitioners] knew or should have known of their interest in this lawsuit substantially before March of 1985" (*id.* at 14A).

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[7] The United States opposed intervention in the district court (Pet. App. 4A). The United States reconsidered the intervention question prior to the appeal, however. Throughout the proceedings in both courts, the United States took the position that there was no merit to petitioners' substantive claim.

Finally, the court noted its agreement with the district court's conclusion that the "balance of hardships" weighed against intervention (Pet. App. 14A) and that no " 'unusual circumstances' " militated in favor of intervention (*id.* at 15A). Accordingly, it determined that the district court had not "abused its discretion in ruling that the application to intervene was untimely" (*ibid.*).

4. Petitioners argue (Pet. 18-26) that the district court abused its discretion in finding their motion for intervention to be untimely. We agree with petitioners that, on the particular facts of this case, their motion to intervene was timely filed. But we do not believe that this narrow, fact-bound, issue warrants review by this Court.

a. In our view, petitioners simply could not have asserted their claim—that the 8106 list was being retired for racial reasons—prior to March 1985, when the City actually retired the list. To be sure, petitioners knew or should have known prior to this time that the 8106 list was based on a discriminatory selection procedure, that the Agreed-to Injunctive Order stated that hiring under it should cease after July 1, 1981, or after the 500th name was reached, whichever came first, and, in any event, that the City would be required to retire the 8106 list when it no longer could accommodate one-for-one minority hiring. As long as minorities remained on the list, however, the list could and in fact did continue to be used under the one-for-one hiring provision of the decree. Thus, petitioners had a reasonable prospect of being hired as long as the list remained in use and, accordingly, prior to March 1985 could not show that they had been discriminatorily denied an employment opportunity.[8] In short, prior to March 1985, had petitioners attempted to assert their

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[8] In 1979, when the Agreed-to Injunctive Order was entered, there were sufficient minorities on the list to ensure that, if the City had to hire from the list beyond the 500th name, white employees (such as petitioners) would still be hired. Likewise, when hiring resumed in

claim that the 8106 list could not be retired for racial reasons, the district court would have had to dismiss their application as premature and as entirely speculative in nature. Therefore, petitioners' motion to intervene, filed shortly after the City decided to withdraw the list, should have been regarded as timely filed. The contrary decision of the court below is in error.

b. Nevertheless, the decision below does not warrant review by this Court. It does not establish any new principle concerning the law of intervention. The court acknowledged that the "timeliness" question must be measured from the point at which the putative intervenors knew or should have known that the particular interest which they asserted was adversely impacted. See Pet. App. 10A. Likewise, it acknowledged that claims of discriminatory denial of employment generally constitute "interests" sufficient to support intervention. *Id.* at 9A. It simply held that, on the unique facts of this case, petitioners knew or should have known in 1979, when the Agreed-to Injunctive Order was first entered, that the 8106 list would be withdrawn when no minorities remained on it

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February 1982 following the strike, there were sufficient minorities remaining on the list to ensure that white employees such as petitioners would continue to be hired pursuant to the one-for-one hiring provision. Indeed, it appears that, until the list was retired in March 1985, petitioners could reasonably have anticipated that eventually they would be hired pursuant to the one-for-one hiring provision of the 1979 Order.

Petitioners were not hired pursuant to the one-for-one hiring provision because a disproportionate number of the minority candidates on the list either could not be located or failed background investigations or physical examinations. Pet. 8; Pet. App. 4A n.3, 4B. It does not appear that petitioners knew or reasonably should have known that the minority candidates would be dropped from the list at this disproportionate rate. Thus, there was no apparent reason to predict that the supply of minority candidates would be prematurely exhausted or that the City would retire the 8106 list before hiring petitioners.

(and therefore that they had been denied a prospective employment opportunity on the basis of race). See *id.* at 11A-14A. In our view, this uniquely factbound decision is not worthy of this Court's time and attention, particularly in light of the opportunity afforded petitioners to compete for positions on the basis of the new test (see page 3, *supra*).

It is therefore respectively submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

ADDENDUM*

This court's examination of the four factors relevant to a determination of whether an application to intervene is timely mandates a finding that insofar as the O'Sullivan applicants seek leave to intervene to challenge the agreed order, their application is untimely. Fundamentally, their contention that intervention is warranted because they have been denied employment due to their race, in that the City wants to strike the 8106 List because there are no more minority candidates remaining on the List, is a challenge to the provisions of the agreed order. The agreed order conditioned the use of the 8106 List beyond July 1, 1981, or after the 500th name on the list was reached upon the City's hiring one minority *candidate to every non-minority candidate. Thus, the agreed order contemplated use of the 8106 List, in the event it had to be used after July 1, 1981 or after the 500th name, only so long as it could accom[m]odate one-to-one hiring. By seeking to strike the list because it no longer contains qualified eligible minority candidates, the City is acting in compliance with the implicit instructions of the agreed order. Thus, to the extent the O'Sullivan applicants seek to intervene in this case because they object to the provisions of the agreed order which condition use of the 8106 List upon one-to-one hiring, their application is untimely.*

The question remains, however, whether the O'Sullivan applicants may be given leave to intervene so they can challenge the City's plan to strike the 8106 List and hire applicants from a new list on a basis other than their dissatisfaction with the agreed order. If another basis for challenging the City's plan exists, the O'Sullivan applicants have moved in a timely manner. Nevertheless, before this

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* The italicized portions of these paragraphs were omitted from the district court's opinion as set forth in the petition (Pet. App. 10B (emphasis added)).

court could grant leave to the O'Sullivan applicants to intervene in this action so they can challenge the City's proposed action, it must first determine whether the O'Sullivan applicants have an interest in the continued use of the 8106 List which would give them a right to intervene in this action or which would persuade this court to give them leave to intervene pursuant to this court's discretion. Specifically, as this court noted on April 4, 1985, this court is concerned with whether the City's "delay in implementing the consent decree and their delay in giving a new exam and creating a new list which they could have done quite legitimately in 1981 has caused [the O'Sullivan applicants] to be put in a position where they have been deprived of some genuine right." Unless the O'Sullivan applicants have a right in the continued use of the 8106 List, their intervention in this matter would serve no useful purpose and would not be warranted because the disposition of this action in their absence would not affect an interest which they have in the subject matter of the litigation.

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MAY 22 1987
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No. 86-1065

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PETE O'SULLIVAN, TERRENCE WHIRTY, JACK CLARK, MIKE DELANEY, JOSEPH LAMONICA, JOSEPH O'NEAL, DANIEL CAULFIELD, KEVIN O'MALLEY, JAMES FITZGIBBON, DON SHELDREW, MICHAEL COLLINS, SCOTT LYNCH, THOMAS RUANE, LAWRENCE MAHLER, DANIEL O'FARRELL, JR., individually and as class representatives,

Petitioners,

v.

UNITED STATES OF AMERICA and THE CITY OF CHICAGO,

Respondents.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "timeliness" requirement in intervention cases should be discarded, contrary to the express provisions of the Federal Rules of Civil Procedure 24(a) and (b), whenever a petitioner asserts that the basis for his intervention is to challenge a consent decree he claims is patently unconstitutional.

2. Whether the Seventh Circuit properly affirmed the district court's decision to deny petitioners' motion to intervene as untimely.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	4
A.	
NO UNSETTLED QUESTIONS OF LAW EXIST IN THIS CASE	5
B.	
CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE NARROW, FACTUAL ISSUE OF WHETHER PETITIONERS FILED A TIMELY MOTION FOR INTERVENTION ..	7
C.	
NO CONFLICT EXISTS BETWEEN THE OPINION BELOW AND THE SETTLED LAW OF THIS COURT AND OTHER COURTS	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	PAGE
Baker, et al. v. United States and City of Chicago, 769 F.2d 205 (7th Cir. 1986)	8, 9
Britton v. South Bend Community School District, 775 F.2d 794 (7th Cir. 1985)	9
Commonwealth of Pennsylvania v. Rizzo, 530 F.2d 501 (3rd Cir. 1976)	10
Corely v. Jackson Police Department, 755 F.2d 1207 (5th Cir. 1985)	10
Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980)	10
Janowiak v. City of South Bend, 750 F.2d 557 (7th Cir. 1984)	9
Local No. 93 International Association of Firefighters v. City of Cleveland, 478 U.S. ___, 92 L.Ed.2d 405, 106 S.Ct. ___ (1986)	9
NAACP v. New York, 413 U.S. 345 (1973)	5, 6, 7, 8
Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977)	6, 7
United States v. Jefferson County, 720 F.2d 1511 (11th Cir. 1983)	10
United States v. South Bend Community School Corp., 710 F.2d 394 (7th Cir. 1983)	7, 8
Wygant v. Jackson Board of Education, 476 U.S. ___, 90 L.Ed.2d 260, 106 S.Ct. ___ (1986)	9

Other Authority	
Federal Rule of Civil Procedure 24	5

In The

Supreme Court of the United States

October Term, 1986

PETE O'SULLIVAN, TERRENCE WHIRTY, JACK CLARK, MIKE DELANEY, JOSEPH LAMONICA, JOSEPH O'NEAL, DANIEL CAULFIELD, KEVIN O'MALLEY, JAMES FITZGIBBON, DON SHELDREW, MICHAEL COLLINS, SCOTT LYNCH, THOMAS RUANE, LAWRENCE MAHLER, DANIEL O'FARRELL, JR.,
individually and as class representatives,

Petitioners,

v.

UNITED STATES OF AMERICA and THE CITY OF CHICAGO,

Respondents.

BRIEF OF RESPONDENT CITY OF CHICAGO IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, white male candidates for firefighter positions in Chicago, seek to intervene to challenge the validity of the 1979 decree entered in this case. That decree settled the dispute between the parties regarding the manner in which firefighters should be hired to correct the adverse impact of a non-validated hiring examination administered by the Chicago Fire Department.

In 1973, the United States filed suit in this matter, alleging that the City of Chicago was engaged in a pattern or practice of discrimination against black and Hispanic individuals with respect to employment opportunities in its fire department (R. 1, p. 3). Specifically, the United States alleged that the hiring tests utilized by the City caused a disparate impact upon minority candidates and had not been shown to be job-related (R. 1, p. 3). After extensive negotiations, the parties entered into a consent decree in 1974, committing the City to adopt long-range goals to substantially increase the minority composition of firefighters in the Chicago Fire Department by at least 50 per cent over the next four years (Appendix to Petition, Amended Consent Decree, at 3D-4D).

In 1978, the City administered a firefighters examination, No. 8106, to thousands of applicants including the present petitioners. The 8106 test results had an indisputable adverse impact on minority candidates: 1,270 of the 4,132 whites passed but only 670 of the 3,286 black and Hispanic applicants passed (R. 168, Exh. B). The City did not attempt to validate the test as being job-related because such efforts would have been futile (R. 168, Exh. B).

The parties negotiated the use of the firefighter eligibility list compiled from the 8106 test. In 1979, the parties settled all issues then outstanding in this case by an "Agreed-To Injunctive Order in Resolution of Firefighters Hiring Issues" which was entered by the district court (R. 128). That order: (1) recommitted the City to the long-range hiring goals adopted in the 1974 consent decree; (2) required the City to develop and utilize a new non-discriminatory test; and (3) in the interim, permitted the City to hire firefighters from the eligibility list compiled from the 8106 test as follows:

> The 1979 Firefighter Eligibility List shall not be further used beyond July 1, 1981 or after the 500th name on the list has been reached, whichever occurs first, provided that if the defendants determine that the needs of the City of Chicago require further hiring from the 1979 Firefighter Eligibility List, such *further hiring shall be on the basis of one black or Spanish-surnamed applicant hired for every white applicant hired* (emphasis added).

The City complied with the provisions of that order. In February of 1982, the City began hiring firefighters from the 8106 list on a one-minority-to-one-white basis (R. 168, Exh. C). The City continued to do so until March of 1985. At that time, the City announced that a new firefighters examination had been developed, that the test would be administered the following June and, consequently, the City intended to retire the 8106 list (R. 168, Exh. C). While the list was still in effect, the City offered every petitioner a permanent firefighter position. Those offers were made in 1980 during a firefighters' strike, as petitioners concede (R. 180). Petitioners declined employment (Petitioner-Appellants' brief, p. vii). On April 2, 1985, the City mailed notifications to the 374 candidates remaining on the 8106 list, all of whom were white, advising them that they must take the new examination if they still wished to become Chicago firefighters (R. 168, Exh. C). Petitioners are persons whose names remained on the 8106 list.

On March 25, 1985, petitioners moved to intervene to declare the minority provision of the 1979 Agreed-To Injunctive Order unconstitutional and enjoin the City from retiring the 8106 list until all persons whose names appeared on the list had been hired (R. 149). Petitioners claimed that the sole reason for retiring the 8106 list was that all names of eligible minority candidates were ex-

hausted. Thus, petitioners argued, the retirement of the list was racially discriminatory.

The district court held that the application for intervention to challenge the 1979 decree was untimely (Appendix to Petition). The appellate court affirmed, holding that petitioners knew or should have known that their interest in being hired in rank order rather than pursuant to a white/minority ratio was adversely affected upon the entry of the Agreed-To Injunctive Order in 1979, or alternatively at the latest in 1982, when the City began hiring firefighters by the white/minority ratio. The appellate court therefore found petitioners' application, filed in 1985, to be untimely (Appendix to Petition). This petition for a writ of certiorari followed.

ARGUMENT

Despite petitioners' attempt to frame the issues in this case as complex unsettled questions of law, this case only presents the simple question of whether petitioners failed to file a timely motion to intervene.[1] Contrary to petitioners' assertions, the appellate court correctly affirmed the district court's decision to deny intervention on that

[1] Petitioners improperly raise the issue that the Equal Protection Clause prohibits a public employer from entering into a consent decree which provides for racial preferences in hiring where there is neither a compelling state interest nor findings of racial discrimination (Petition, 12-17). Because petitioners were not allowed to intervene, neither court below addressed this issue. Moreover, petitioners advised the district court that they were not seeking review of the merits of their claims (R. 163). Accordingly, the City will not address the issue here.

basis and, in any event, this narrow, factual issue does not warrant Supreme Court review.

A.

NO UNSETTLED QUESTIONS OF LAW EXIST IN THIS CASE.

Petitioners present two arguments to attempt to convince this Court that unsettled questions of law exist in this case. Both arguments border on the frivolous. First, petitioners urge this Court to "grant a writ of certiorari to clarify exactly when and how an affirmative action consent decree may be attacked by third parties" (Petition, p. 19). That settled question obviously does not warrant review because the procedure is simply to file a timely application for intervention under Federal Rule of Civil Procedure 24(a) or (b).

Second, petitioners argue here, for the first time, that the "timeliness" requirement for intervention should be discarded when applicants claim that a consent decree is patently unconstitutional.[2] That argument does not merit review because the Federal Rules of Civil Procedure 24(a) and (b) bar any exception to the "timeliness" requirement in intervention cases. As this Court stressed in *NAACP v. New York*, 413 U.S. 345 (1973), under Fed. Rule Civ. Proc. 24, a motion to intervene must be denied unless the court is satisfied that the petitioner has moved to intervene in a timely manner:

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[2] Contrary to petitioners' claim that the record shows that the consent decree in this case is "patently unconstitutional", the record contains only petitioners' bald characterizations. The City properly never responded to those claims because the merits of the decree were never in issue.

> Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24(a) and Rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied.

413 U.S. at 365. Thus, the "timeliness" requirement is a threshold matter which a court must determine before addressing the merits of any claim.

Petitioners are asking this Court to carve out a new *per se* rule that where a petitioner seeks to challenge a consent decree by claiming that the decree is patently unconstitutional, no showing of timeliness is required at all. Such a rule would obviously be unworkable, since all petitioners would simply adopt those magic words in their petitions to intervene. In any case, such a rule is unnecessary, since there is enough flexibility in the standard set forth by the federal courts for assessing the timeliness of a motion to intervene to prevent an unjust result under the circumstances of any given case. *See Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977).

Persons seeking intervention must be obligated to file their motion at the earliest opportunity to prevent undue prejudice to the litigants of the case as well as persons governed by the decree. Moreover, the long-standing interest in the finality of judgments would not be preserved if a consent decree, the negotiated compromise of the parties' differing positions, could be overturned lightly years after its implementation.

In sum, there is no reason to grant certiorari here. This case presents no unsettled question of law. As shown below, the court merely applied the particular facts of this case to settled principles of law. Review of that decision, which was clearly correct, does not merit the attention of this Court.

B.

CERTIORARI SHOULD NOT BE GRANTED TO REVIEW THE NARROW, FACTUAL ISSUE OF WHETHER PETITIONERS FILED A TIMELY MOTION FOR INTERVENTION.

The Seventh Circuit in this case correctly affirmed the district court's decision that petitioners had failed to file a timely application for intervention. The Seventh Circuit carefully considered the factual record and assessed the timeliness of petitioners' application by the standard set forth in *NAACP v. New York*, 413 U.S. 345, 366 (1973) and the leading lower-court case, *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977). The court properly concluded from that review that petitioners should have moved to intervene when the Agreed-To Injunctive Order was entered in 1979. Their application filed six years later was, without question, untimely.

Petitioners concede that they have sought intervention to overturn the 1979 Agreed-To Injunctive Order principally on the ground that its white/minority ratio provision is unconstitutional. The terms of the 1979 Agreed-To Injunctive Order required the City to hire persons whose names appeared on the 8106 eligibility list by that ratio after a specified time and bound the City to discard the 8106 list when ratio hiring was no longer feasible. Petitioners, white males whose names appear on the 8106 eligibility list, claim they were denied employment on the basis of racial discrimination because the City retired the 8106 list when the names of minority candidates were exhausted.

A motion to intervene must be filed as soon as the applicants knew or should have known that their interest in the litigation might be adversely affected. *See United States v. South Bend Community School Corp.*, 710 F.2d

394, 396 (7th Cir. 1983). Here, under the terms of the 1979 decree, petitioners were notified that they might not be hired on account of their race. Where, as here, the consent decree was well-publicized—it is undisputed that petitioners were aware of the litigation even prior to the entry of the decree—petitioners should have intervened at the earliest opportunity, in 1979 upon entry of the decree. *See NAACP v. New York*, 413 U.S. 345 (1973). Yet, petitioners did not file their motion to intervene either at that time or when the ratio hiring went into effect in 1982. Petitioners did not seek intervention until the City announced the retirement of the 8106 list in 1985.

The Seventh Circuit correctly rejected petitioners' argument that their application in 1985 was timely because until that time they had assumed either that: (1) the 8106 list would be utilized only on a temporary basis or (2) the list of minority candidates would not run out. Mistaken assumptions do not justify an applicant's neglect to file a timely motion to intervene until those assumptions are proved wrong. *Baker, et al. v. United States and City of Chicago*, 769 F.2d 205 (7th Cir. 1986). The standard is an objective one. Actual knowledge of how the decree might adversely affect them is irrelevant if applicants should have known of this possibility and thus intervened at an earlier date. *NAACP v. New York*, 413 U.S. 345 (1973).

Nor can the petitioners rely on their mistaken assumption that a labor agreement between the City of Chicago and Fire Fighters Local No. 2 conferred upon them an unconditional right to employment. The agreement made no such promise. To the contrary, the agreement expressly incorporated the terms of the 1979 Agreed-To Injunctive Order and provided that those terms were paramount to the terms of the labor agreement (Collective Bargaining Agreement, Appellants' Appendix at 86).

There is no reason to grant certiorari in this case. Given the facts in this case, the district court undoubtedly did not abuse its discretion in finding petitioners' motion to intervene untimely.

C.

NO CONFLICT EXISTS BETWEEN THE OPINION BELOW AND THE SETTLED LAW OF THIS COURT AND OTHER COURTS.

Petitioners argue that the decision of the Seventh Circuit in this case conflicts with two decisions of this Court and with two decisions of the Seventh Circuit: *Local No. 93 International Association of Firefighters v. City of Cleveland*, 478 U.S. ____, 92 L.Ed.2d 405, 106 S.Ct. ____ (1986); *Wygant v. Jackson Board of Education*, 476 U.S. ____, 90 L.Ed.2d 260, 106 S.Ct. ____ (1986); *Janowiak v. City of South Bend*, 750 F.2d 557 (7th Cir. 1984); *Britton v. South Bend Community School District*, 775 F.2d 794 (7th Cir. 1985). However, no conflict in the decisions exists because none of those cases involves the issue of whether applicants have met the requirements for intervention.

The Seventh Circuit's decision in this case is entirely consistent with its prior decisions as well as the decisions of other circuits. For example, another panel of the Seventh Circuit reached a similar result in *Baker, et al. v. United States and City of Chicago*, 796 F.2d 205 (7th Cir. 1986). In that case, candidates whose names appeared on an eligibility list for police officer positions moved to intervene in 1985 to challenge the constitutionality of a white/minority ratio provision in a consent decree entered in 1982. The *Baker* panel denied the motion to intervene as untimely because the *Baker* candidates should have known that they would not be hired in rank order when the consent decree was entered in 1982.

The decision below is also consistent with the decisions of numerous other circuits assessing the timeliness of a motion to intervene to challenge white/minority ratios imposed to remedy an adverse impact upon minority applicants hired for public employment positions. In each case, the courts, rejecting a myriad of excuses for the failure to file a timely motion, held that the time to intervene is before or upon the entry of the decree imposing the white/minority ratios. *See e.g., Corely v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985); *Culbreath v. Dukakis*, 630 F.2d 15, 21 (1st Cir. 1980); *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 507 (3rd Cir. 1976).

Thus, the Seventh Circuit's decision is supported by ample authority. No conflict exists between any of the cases cited by petitioners and this case. Petitioners' case has been treated with precision and thoroughness. Accordingly, their petition for a writ of certiorari should be denied.

CONCLUSION

For all the reasons listed above, respondent CITY OF CHICAGO respectfully requests that the Court deny the Writ of Certiorari.

Respectfully submitted,

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